



In the Matter of

Digital Performance Right in Sound
Recordings Rate Adjustment

Docket No. 2001-1 CARP DSTRA 2

LIBRARY
OF
CONGRESS

ORDER

COPYRIGHT
OFFICE

Copyright
Arbitration
Royalty
Panels

On January 17, 2003, Royalty Logic, Inc. ("RLI") filed a motion to permit a late filing of its Notice of Intent to Participate ("NOI") in the above-captioned proceedings. RLI would like "to participate in this proceeding with respect to the appointment of Receiving Agents and Designated Agents, and the adoption of any license terms and conditions and regulations pertaining to the collection, allocation and payment of royalties to Copyright Owners and Performers." The Recording Industry Association of America, Inc., on behalf of itself and SoundExchange, along with the American Federation of Television and Radio Artists and the American Federation of Musicians of the United States and Canada (collectively, "Copyright Owners and Performers") oppose the motion on procedural and substantive grounds.

Discussion

A. Status of Proceeding

P.O. Box 70977
Southwest
Station
Washington
D.C. 20024

Telephone:
(202)707-8380

Facsimile:
(202)252-3423

The purpose of this proceeding is to set rates and terms for the use of sound recordings by three preexisting subscription services (Music Choice, DMX Music, Inc. and Muzak, LLC) and the two preexisting satellite digital audio radio services (Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc.). Prior to January 17, 2003, all parties were scheduled to begin the 45-day precontroversy discovery period on February 23, 2003, with the filing of direct cases. However, on January 17, the three preexisting subscription services and the Copyright Owners and Performers filed a joint petition with the Copyright Office, requesting that the Office publish the parties' proposed rates and terms applicable to the preexisting subscription services for public comment; which it did on January 30, 2003. 68 FR 4744. The settlement, however, did not propose rates and terms for the two preexisting satellite digital audio radio services which are also parties to this proceeding. As a result, the Office vacated the precontroversy discovery schedule which required all five preexisting services to file direct cases on February 23, 2003 and set a new schedule for the 45-day discovery period, making it applicable only to the satellite digital audio radio services and the Copyright Owners and Performers. Order, Docket No. 2001-1 CARP DSTRA 2 (January 23, 2003).

Because the proceeding has been bifurcated, this Order deals only with RLI's motion as it pertains to the satellite digital audio radio services and the upcoming precontroversy discovery period set to begin on March 19, 2003, with the filing of direct cases. The Office shall consider RLI's standing to participate in a CARP proceeding with regard to the three preexisting subscription services in a separate order addressing RLI's comments to the Office's January 30, 2003, notice of proposed rulemaking. In that order, the Office shall address the opposition's argument regarding RLI's right to participate in this proceeding as an interested party.

B. Assessment of Disruption and Good Cause

The Copyright Office will accept late filings of Notices of Intent to Participate from parties with standing to participate in the proceedings, provided that the acceptance does not cause disruption to the proceeding and the moving party can show good cause for accepting the late filed notice. See, e.g., Order, Docket No. 99-3 CARP DD 95-98 (August 5, 1999) and Order, Docket No. 2000-9 CARP DTRA1&2 (December 14, 2000). Minimal disruption to the proceeding, however, does not abrogate the required good cause showing.

RLI purports to meet these requirements. It maintains that its participation at this stage of the proceeding would not cause any disruption to the proceeding or impose any additional burden on the other parties for two reasons. First, parties have yet to submit direct cases in this proceeding; and, second, RLI states that its interests are limited only to the issues regarding Designated Agents and the collection and distribution of royalty fees to Copyright Owners and Performers. Moreover, RLI maintains that its prior designation as an agent for purposes of making further distributions to its clients in a past proceeding constitutes good cause for its participation in the current proceeding on several fronts. According to RLI, offering a choice of agents to Copyright Owners and Performers fosters competition and creates benefits that necessarily flow to the Copyright Owners and Performers due to receive the payments. RLI asserts good cause for its participation in this proceeding because it can offer advice to the panel and the Office "in connection with the adoption of license terms and conditions applicable to the collection and distribution of the royalty payments." Motion at 3-4.

Copyright Owners and Performers oppose the RLI motion because they contend that accepting the notice would cause disruption to the proceeding and compel the parties who filed timely notices to proceed to a CARP even though all such parties have already reached an agreement with regard to the subject matter of this proceeding as it relates to the preexisting subscription services for the period January 1, 2002, through December 31, 2007. See 68 FR 4744 (January 30, 2003). Copyright Owners and Performers contend that to grant the late-filed Notice of Intent would undermine any incentive parties may have to settle their differences if at the last moment new entrants to the proceeding can come forward and force the settling parties to a CARP.

Moreover, Copyright Owners and Performers maintain that RLI has failed to show good cause why the Office should accept its late filing. Nothing prevented RLI from filing its notice in response to the Office's request for such documents by the December 20, 2001 deadline. In fact, RLI had announced its intention to become an alternative designated agent to SoundExchange in written and oral rebuttal testimony submitted in an earlier CARP proceeding prior to the filing deadline and could easily have filed its notice to preserve its options and should have done so at that time. At the very least, the Copyright Owners and Performers contend that RLI has no excuse for not filing the motion to accept a late filing and the notice shortly after RLI became a designated agent by virtue of the fact that the Librarian accepted the CARP's recommendation in the earlier proceeding to have two separate agents. See 67 FR 45240, 45267 (July 8, 2002). Instead, it waited over seven months to make the filings and offers no rationale for the prolonged delay. Copyright Owners and Performers argue that such actions

by RLI totally "belie its claim to be efficient" and "its ability to teach the parties and the Copyright Office about efficiency and good practices in administering the section 112 and 114 statutory license royalties." Opposition at 9.

RLI responds that until the July 8, 2002 Order, it had no reason to expect that the rules would provide for a designated agent and that until it was clear that RLI could be so designated, the delay in filing was reasonable and excusable.

Decision

The Copyright Office finds that RLI has made an insufficient showing of good cause for accepting its motion to accept a late-filed notice of intent in this proceeding since its submission came over a year after the Office asked for the notice and more than seven months after the July 8 Order. RLI had clearly demonstrated its interest and intention to become a designated agent for the purpose of administering royalty fees collected pursuant to the section 112 and 114 licenses as early as October, 2001, and should have complied with the Office's December, 2001 filing deadline had it any intention in pursuing its interest in becoming a designated agent in other proceedings. Moreover, RLI's argument that it needed to know with certainty whether it could be designated as an agent for purposes of receiving and distributing royalty fees does not excuse RLI's decision to wait another seven months before filing its NOI, especially in light of the fact that filing of written direct cases was scheduled to take place less than a month after the completion of the pleading cycle for this motion. Filing of a Notice of Intent is neither burdensome nor costly. It does, however, provide critical information to the parties with an interest in the outcome of the proceedings so that these parties can explore settlement options in order to avoid the expense associated with convening a CARP and develop direct cases based upon knowledge of the identity of all participating parties.

To now ask the parties to redo their direct cases and delay the start of this proceeding is more than a minor disruption to the proceedings at this stage. Moreover, the party causing the disruption has utterly failed to make a showing of good cause for not making the required filing in a timely manner.

Having failed both prongs of the test for accepting late-filed Notices of Intent to Participate, the motion to permit late filing of the Notice of Intent to Participate **IS DENIED**.

SO ORDERED.

Marybeth Peters,
Register of Copyrights.

BY:



David O. Carson,
General Counsel.

DATED: March 14, 2003